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No. 91-6194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL CROSBY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 43 and the United States Constitution permit the trial *in absentia* of a defendant who is not present at the beginning of his trial?

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PETITIONER'S BRIEF ON THE MERITS

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 917 F.2d 362 (8th Cir. 1990) (J.A. 52-69).

JURISDICTION

The Court of Appeals entered its judgment on September 30, 1991, *nunc pro tunc* to January 24, 1991 (J.A. 71). That Court had previously denied a petition for rehearing and suggestion for rehearing *en banc* on May 8, 1991 (J.A. 70). Petitioner's petition for a writ of *certiorari* was docketed on October 21, 1991, and

granted on March 2, 1992 (J.A. 72). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to have the Assistance of Counsel for his defense.

Federal Rule of Criminal Procedure 43. Presence of the Defendant.

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) Continued presence not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> > (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or
> >
> > (2) after being warned by the court that disruptive conduct will cause removal of the defendant from the courtroom, persists in conduct which is such to justify exclusion from the courtroom.
>
> (c) Presence Not Required. A defendant need not be present in the following situations:

> > (1) A corporation may appear by counsel for all purposes.
> >
> > (2) In prosecutions for offenses punishable by fine or imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.
> >
> > (3) At a conference or argument upon a question of law.
> >
> > (4) At a reduction of sentence under Rule 35.

STATEMENT OF THE CASE

On April 20, 1988, a Federal Grand Jury in Minnesota indicted Petitioner and six others on thirty-six counts of mail fraud (J.A. 1).[1] The indictment alleged that Petitioner and his co-defendants had devised a fraudulent scheme to sell military-veteran commemorative medallions to fund construction of a theme park honoring veterans. The facts of the scheme alleged by the indictment are not relevant to the issue on which this Court granted the Writ.

The Petitioner made his first appearance on the indictment on June 15, 1988, before a Federal magistrate in Minneapolis, Minnesota, the Honorable J. Earl Cudd, who ordered him detained (J.A. 1). After a detention hearing on June 23, 1988, Magistrate Cudd set conditions of release for Petitioner, which included the execution of a $100,000 surety bond and a requirement to report every week-day to the court's pretrial services office (*Id.*; Tr. Vol. I, 36, 37).[2] Another condition required him to remain in the State of Minnesota unless permitted by

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[1] "J.A." refers to the Joint Appendix.

[2] "Tr." refers to the transcript of the proceedings in the district court.

the court to leave (Tr. Oct. 7, 1988 hrg., 16). Petitioner posted the bond on July 5, 1988 (J.A. 1).

On July 28, 1988, the district court set a pretrial conference for August 15, 1988, which Petitioner attended (J.A. 1). The presiding judge, the Honorable Donald D. Alsop, Chief Judge for the United States District Court for Minnesota, announced that the trial would begin October 12, 1988, but did not give a specific starting time for that date (*Id.*). The court clerk, however, sent out a trial notice to counsel on September 12, 1988, advising that trial would start at 9:30 a.m. on October 12 (*Id.*).

On September 16, 1988, Petitioner's counsel, Douglas Altman, filed a motion to withdraw, which Magistrate Janice Symchych heard on September 19 (J.A. 2). Petitioner attended the hearing, during which the prosecutor and the Magistrate made several references to a trial date of October 12 (Tr. Sept. 19, 1988 hrg., 3, 5, 7, 12). At another pre-trial conference held on September 30, 1988, attended by Petitioner and Mr. Altman, Altman said he had no objection to the trial starting on October 12 (J.A. 2). Mr. Altman later renewed his motion to withdraw, and at a hearing on the renewed motion held October 7, 1988, the court, counsel, and Petitioner all referred to the trial date of October 12 (Tr. Oct. 7, 1988 hrg., 3, 8, 15, 19, 20).

On the morning of Wednesday, October 12, 1988, the Petitioner did not appear at the 9:30 a.m. start of his trial (J.A. 7). No one knew his whereabouts (J.A. 8, 10). At 10:25 a.m., Mr. Altman told Judge Alsop that since 9:30 a.m. he had been trying to contact the Petitioner by phone but without success (J.A. 9-10). A few minutes later, Judge Alsop ordered the clerk's office to issue a warrant for Petitioner's arrest, which the Judge signed before noon that day and gave to the marshals to execute (J.A. 12, 16). The court also contacted the Petitioner's bondsman to enlist his assistance in locating the Petitioner (J.A. 20).

Some time after 1:30 p.m. on October 12, a deputy reported to the court and to the parties that two other deputies had gone to the Petitioner's home after he had failed to appear in court that morning, and had looked in the windows. Based on their observations, the deputy told the court that "the place looked like it is cleaned out" (J.A. 19). He also reported that while the deputies were at the home, neighbors reported to them having seen Petitioner's car backed halfway into his garage the previous evening, giving the neighbors the impression that he might possibly be packing his trunk (*Id.*).

The court then said that it would postpone the trial on a day-by-day basis and make no decision on starting in the Petitioner's absence until the following Monday, October 17, but that it would conduct a bail forfeiture hearing the next morning, October 13, at 8:30 a.m. (J.A. 18, 20). The court remarked that it had not planned to conduct trial on Fridays in any event, so Friday, October 14, would not be a lost day (J.A. 20), and that it would try to get another case tried in the one or two days it was planning to wait to begin the Petitioner's trial, although it was having difficulty contacting one of the lawyers involved in the other case (J.A. 26-28). When the court raised the subject of conducting the trial in the Petitioner's absence, Mr. Altman objected (J.A. 15, 33).

The defendants present for trial, James Sannes, Jack Cunningham, and Martin Cheatham told the court that they wanted a continuance until the Petitioner could be located because they wanted to call him as a witness (Tr. Vol. I, 8-13, 22-23). (The Petitioner had provided co-defendants Cunningham and Sannes with his own affidavit stating that if his case were severed that he would testify in their defense (*Id.*)). Co-defendants Cunningham and Sannes said they would waive their speedy trial rights to obtain the continuance (J.A. 22-23).

The court requested everyone to remain until 4:30 p.m., when an update would be available from the deputy marshals looking for the Petitioner (J.A. 24). As the afternoon progressed, the court remarked several times that the pool of 54 potential jurors was being kept waiting without any idea why, and that the delay in the proceedings would interfere with the court's calendar (J.A. 25-30). The prosecutor commented on the difficulty she would have in re-trying the case, should the petitioner later appear, because many of her witnesses were elderly and some had health problems (J.A. 23-25).

At the end of the day, a deputy marshal reported that the Petitioner had not been located and that she had no update as to how the investigation was proceeding (J.A. 31). The court told the parties that it did not want to call the prospective jurors back for the next day because there was no certainty the trial would start then, and ordered the case continued until Monday, October 17 for a decision on whether the case would proceed (J.A. 31-32). The prosecutor then said the Government's position was that it wanted the trial to proceed on Monday no matter what (J.A. 33). The co-defendants restated their position that they wanted the Petitioner present for the trial and were willing to wait for his return (J.A. 34-35).

The next morning, Thursday, October 13, the court held a bail forfeiture hearing (J.A. 3). Present were the prosecutor and the Petitioner's counsel, bondsman, father, and two of his brothers (J.A. 43). None of the persons at the hearing knew where the Petitioner was (*Id.*). The hearing resulted in the forfeiture of Petitioner's bond (J.A. 3, 43). In the afternoon, the court held another session with the prosecutor and the co-defendants (J.A. 36). The Petitioner still had not appeared, and the marshals had nothing further as to his whereabouts (J.A. 37). Immediately after the deputy marshal made his report, the court, in a change from its earlier plan to

wait until October 17 before deciding what to do, announced that it had prepared an order and findings permitting the trial to proceed in the Petitioner's absence (J.A. 37-38).

The court then asked the parties to state again their positions on starting or delaying the trial (J.A. 38-39). The Government said it was now making a formal request to begin the trial October 17, regardless of Petitioner's absence (J.A. 38). Counsel for the co-defendants again objected, stating that they were willing to waive their rights to a speedy trial until Petitioner returned or could be located (J.A. 39). The Petitioner's counsel also opposed the request (*Id.*). The court then stated for the record its findings of fact, which included that the Petitioner had had adequate notice of the trial date, citing the above-mentioned written trial notice and the court appearances at which the trial date had been mentioned, and that rescheduling the trial would present extreme difficulty to the Government, witnesses, counsel, and the court (J.A. 41-44).

The court put its findings and order in writing (J.A. 48-51), but while reading them into the record it made an additional finding that

> . . . the court at this time has been further advised that notwithstanding a 5 day or a 4 day postponement of the trial until Monday, October 17, the Marshal's service remains unable to locate or apprehend defendant Michael J. Crosby.

(J.A. 43).

The court filed its findings and order the next day, October 14, 1988 (J.A. 3). Trial began on Monday, October 17, in the Petitioner's absence, starting with jury selection, and continued in his absence to a conclusion on November 18, 1988, when the jury returned its verdicts, convicting all defendants on all counts but acquitting James Sannes (J.A. 4).

Deputy U.S. marshals arrested the Petitioner on May 11, 1989. On July 13, 1989, the Petitioner's trial counsel moved to withdraw, and the court then appointed Petitioner's present counsel (J.A. 4-5). On August 21, 1989, Judge Alsop sentenced Petitioner on his mail fraud convictions and imposed statutory-maximum five-year terms on each count of conviction (J.A. 5). The court ran four of the terms consecutively, making Petitioner's total sentence of imprisonment twenty years, followed by a five-year probationary term (*Id.*). The Petitioner appealed his convictions to the Eighth Circuit Court of Appeals. On the trial-*in-absentia* issue, the Circuit Court held that a defendant who does not appear for his trial waives the protection of Federal Rule of Criminal Procedure 43. (J.A. 52-53, 59).

SUMMARY OF ARGUMENT

A. The plain wording of Rule 43 prohibited the district court from trying the Petitioner *in absentia* because the Rule expressly limits waiver of the right to be present to defendants who are "initially present" at trial. The Notes of the Advisory Committee that drafted the Rule make it clear that these words of limitation are not mere surplusage or the result of an oversight in the rule-drafting process. The Notes state that the Rule is a restatement of existing law, citing this Court's decision in *Diaz v. United States*, 223 U.S. 442 (1912), which determined that the Sixth Amendment and the common law permit a defendant to be tried *in absentia* if he voluntarily absents himself after his trial begins.

B. Rule 43's right of presence has its origins not only in the Sixth Amendment and the common law, but in the Fifth Amendment Due Process Clause. A rule of orderly trial procedure fashioned by this Court and predating the Rules of Criminal Procedure constitutes another of Rule 43's roots. Because of the many and varied sources giving rise to the Rule, it is often spoken of as being broader than the Constitutional right of presence.

C. The Eighth Circuit Court of Appeals concluded that the Petitioner, even though not present when the trial started, nonetheless waived his right to be present. The Circuit Court reached this result by following a line of cases that superimposes on Rule 43 a waiver provision broader than the one it contains. These cases are best exemplified by the Fourth Circuit's decision in *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976), and the Third Circuit's decision in *Government of the Virgin Islands v. Brown*, 507 F.2d 186 (3rd Cir. 1975).

The first case, *Peterson*, avoids Rule 43(b)(1)'s "initially present" language by construing as non-binding dicta *Diaz*'s statement that a defendant may be tried in his absence if he departs after his trial begins. *Peterson* says that this statement simply reflects the factual situation in *Diaz* in which the defendant's waiver of the right to be present occurred (after the trial had begun), not an intent to limit trial *in absentia* only to defendants initially present.

Diaz's statement concerning the limits on trial *in absentia* is not mere dicta. To the contrary, it is an authoritative pronouncement on the scope of a criminal defendant's Sixth Amendment right to be present at trial, based on *Diaz*'s apprehension of that right at common law. Thus, although *Diaz* affirmed the defendant's conviction because he left after the trial had begun, given that Court's clear intent to make the Constitutional right to be present at trial as broad as the right at common law, his conviction certainly would have been reversed had he left before the trial.

In the second case, *Brown*, the Third Circuit says that Rule 43's "initially present" language has no special significance and need not be followed. *Brown* reasons that if the Rule gives a defendant the ability to waive his presence after the trial begins, and thereby to miss crucial portions of the trial, it does not make sense to

interpret the Rule to prevent him from waiving his presence at the beginning, when what it viewed as less important events, such as jury selection, occur.

Brown fails to appreciate, however, that Rule 43 has its roots in the common law, which strongly disfavors trial *in absentia*. The common law decided that it would permit such trials only if the defendant left after the trial had begun in his presence, even though it was clear that a defendant could, by leaving before the trial began, prevent his trial from taking place. The common law simply made a judgment that trial *in absentia* was to be avoided, and that only when the trial had begun in the defendant's presence would the interests of finality and judicial economy in proceeding to a conclusion predominate. Thus, Rule 43's "initially present" language has less to do with the defendant's ability to waive his right to be present than it does with preventing trials *in absentia*, except in a narrow category of cases.

D. Aside from Rule 43's plain wording and its Constitutional and common law underpinnings, considerations of sound procedure and practice in the Federal judicial system require that this Court apply Rule 43 as written.

Common sense and the principles of statutory construction require that courts give effect to all portions of Rule 43, and they do not permit reading into the Rule a waiver provision concerning the right of presence far broader than the one it contains. The presence of a narrow waiver provision in the Rule presumes that a broader one was rejected.

If this Court does permit district courts to add to Rule 43 a waiver provision reaching defendants who absent themselves before trial, the results will include not only a denial of the right of presence guaranteed under the Rule and the Constitution, but a lack of uniformity in Federal judicial procedure, and possibly the denial of due process, as district courts implement *ad hoc* procedures to

determine if a defendant has voluntarily absented himself, and if he has, whether the trial should be held in his absence.

Another consideration to be kept in mind if this Court approves the engrafting of a broader waiver provision onto Rule 43 is the likelihood that doing so will encourage similar departures from, or expansions upon, other procedural rules. The disregard some Federal courts have shown for Rule 43 is particularly troublesome because nothing in this Court's jurisprudence would have suggested to them that the Rule's limitation on *in absentia* trials could be disregarded.

Whether or not Rule 43 continues to find support in the Constitution, violations of the Rule should be remedied by the exercise of this Court's supervisory authority over the Federal courts. Exercising that authority in this case will avoid the problems, discussed above, that have arisen, or likely will arise, owing to the failure of some courts to follow the plain wording of the Rule.

E. Where a Rule 43 violation results in the defendant not being present at any stage of his trial, which is what happened in the Petitioner's case, so fundamental a right has been lost that no prejudice need be shown. If it does, the test is whether the defendant's absence was harmless error beyond a reasonable doubt. Here, the Government portrayed Petitioner as the central figure in the fraud scheme, most of the evidence in the case related to him, and a co-defendant took advantage of his absence by questioning Petitioner's brother about it, and then arguing that the absence was evidence of guilt. His absence also meant that he could not participate in the selection of the jury and confront his accusers. The prejudice thus attendant to trying the Petitioner *in absentia* cannot, on these facts, be considered harmless error beyond a reasonable doubt.

F. Upholding Rule 43 will safeguard the Constitutional and common law rights upon which the Rule is

based, but whether or not this Court finds that the Constitution continues to prohibit the trial *in absentia* of a defendant not initially present, Rule 43's prohibition against such trials simply cannot be ignored. If this Court deems the Rule to be unworkable in today's Federal judicial system, the Rule can be changed. Until then, it must be followed.

ARGUMENT

FEDERAL RULE OF CRIMINAL PROCEDURE 43 AND THE CONSTITUTION DO NOT PERMIT THE TRIAL *IN ABSENTIA* OF A DEFENDANT WHO IS NOT PRESENT AT THE BEGINNING OF HIS TRIAL.

A. The plain wording of Rule 43 prohibited the district court from trying the Petitioner *in absentia* because the Rule expressly limits waiver of the right to be present to defendants who are "initially present" at trial.

The District Court should not have tried Petitioner in his absence because he was not initially present when the trial began, as required by Federal Rule of Criminal Procedure 43. Because the entire Rule is set out at pages 2-3 of this brief, we quote below the most pertinent section:

> (b) Continued presence not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, *initially present*,
>
> > (1) is voluntarily absent *after* the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial) . . . (emphasis added).

The Rule plainly requires a defendant's presence at the outset of the trial as a condition of trying him in his later

absence.[3] The Petitioner was never present at any stage of his trial, and his counsel objected to a trial *in absentia* (J.A. 7, 15, 39).

The language in Rule 43(b) stating that a defendant who voluntarily absents himself must have been initially present before the trial can proceed in his absence is not surplusage or the result of inadvertence on the part of the Rule's Drafters. Paragraph 2 of the original Advisory Committee Note to Rule 43 says:

> The second sentence of the Rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself *after the trial has been commenced in his presence, Diaz v. United States*, 223 U.S. 442, 455 . . . [1912]; *United States v. Noble*, 294 Fed. 689 (D. Mont. [1923])—*affirmed*, 300 Fed. 689 C.C.A. 9th [1924]; *United States v. Barracota*, 45 F.Supp. 38, S.D.N.Y. [1942]; *United States v. Vasalo*, 52 F.2d 699, E.D. Mich. [1931] (emphasis added).

This Court made changes to Rule 43 in 1974, the most significant of which was to incorporate its holding in *Illinois v. Allen*, 397 U.S. 337 (1970) permitting a trial court to remove an unruly defendant.[4] However, the portion of the Rule with which we are concerned, paragraph (b) and subparagraph (b)(1)'s limitation on trials *in absentia* to defendants "initially present," still reads, for practical purposes, just as it did before 1974.[5]

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[3] For purposes of Rule 43, trial begins with impaneling the jury. See, *Rogers v. United States*, 422 U.S. 34, 39 (1975) and *United States v. Crutcher*, 405 F.2d 239, 242 (2nd Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

[4] Another change removed the limitation on *in absentia* trials to non-capital trials. See, 8B *Moore's Federal Practice*, Section 43.01[1] (2d ed. 1980).

[5] According to C. Wright, *Federal Practice and Procedure*, Section 721, 5 at n. 1 (1982), prior to 1974 the Rule read as follows:

B. Rule 43's origins in the Constitution and the common law leave no doubt that the Rule does not permit the trial *in absentia* of a defendant not initially present.

The Drafters of Rule 43 relied on and incorporated *Diaz v. United States*, 223 U.S. 442 (1912) because it stated the existing law on the permissibility of trial *in absentia*. See *Taylor v. United States*, 414 U.S. 17, 19 (1973). Defendant Diaz had been charged in the Philippines with non-capital murder. Twice during his trial he voluntarily left, each time expressly waiving the right of presence granted him under Philippine statutes, Sections 3270, 3271, 3280, and 3296, which required a defendant's presence at a plea of guilty and judgment, and which entitled a defendant to be present at every other stage of the proceedings. 223 U.S. at 453. The issue on appeal was not whether Diaz had voluntarily waived his right of presence or had been denied any right of confrontation, but whether he could even waive his right to be present, and if he could not, whether his absence meant that the trial court lacked the power to proceed. *Id.*

To decide this question, this Court looked to Section 5 of the Philippine Civil Government Act, which granted a criminal defendant "the right to be heard by himself and counsel . . . ." 223 U.S. at 454. According to *Diaz*, if

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The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. ***In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.*** A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35 (emphasis added).

this portion of the Act made a defendant's presence indispensable, it made no difference that the Philippine statutes mentioned above permitted a waiver of the entitlement to presence because the Act's constitutional status made it superior to the statutes. *Id. Diaz* then said that because Section 5's "right to be heard by himself and counsel" is similar to the right to be present at trial guaranteed by the Sixth Amendment to the United States Constitution, and because the Act was intended to embody and to carry to the Philippines the Constitutional rights to which United States citizens were entitled, it would interpret Section 5 for the Philippines just as it had interpreted the Sixth Amendment right of presence for the United States. *Id.* at 455.

The *Diaz* Court then reviewed American law concerning trial *in absentia* to determine if the Sixth Amendment permitted a waiver of the right of presence. It concluded that the prevailing rule at common law was:

> . . . that if, after the trial has begun in his [the defendant's] presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial . . . ."

223 U.S. at 455 (citations omitted). After defining the Sixth Amendment right of presence by reference to the common law rule, *Diaz* next applied Section 5 of the Act in the way the Sixth Amendment and the common law had been applied in the United States, that is, to permit a waiver of the right of presence in the case of a defendant who, initially present at his trial, voluntarily absents himself. *Id.* Thus, Defendant Diaz's departure after the beginning of his trial no more deprived the trial court of the power to proceed than would have a like departure by a defendant in an American court.

Significantly, *Diaz* expressly recognized the problem that defendants who absent themselves can create for the judicial system, but it did not allow this to modify what it recognized as a clear-cut rule, namely, that a trial

actually pending before a jury may proceed as to an absent defendant only if he was initially present:

> Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

223 U.S. at 458, quoting *Falk v. United States*, 15 App. D.C. 446, 460-61 (1899), *cert. denied*, 181 U.S. 618 (1901).

Though *Falk* strongly condemns a defendant's absenting himself from trial, there is no question that it did not even contemplate the possibility of proceeding with the trial of a defendant who leaves before his trial begins. To begin with, *Falk* involved a defendant who was present when his trial began. 15 App. D.C. at 450. Furthermore, *Falk* specifically said that:

> It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he is pleased, to withdraw himself from the courts of his country and to break up a *trial already commenced*.

Id. at 454 (emphasis added).

Up to this point, we have focused primarily on Rule 43's origins in the common law and the Sixth Amendment. This Court had occasion to allude to these sources of the Rule in *Illinois v. Allen*, 397 U.S. 337, 338 (1970), where it said: "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial," citing *Lewis v. United States*, 146 U.S. 370 (1892). However, Rule 43's limitation on trial *in absentia* has origins in other parts of the Constitution, as well as in non-Constitutional principles.

The Constitution contains also a due process right of presence. In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), which decided that a defendant did not have a Constitutional right to be present when the jury viewed the scene of the alleged crime, this Court held that a defendant has a right to be present

> . . . under the Fourteenth Amendment . . . whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.

Id. at 105-06. In *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975), this Court cited *Snyder v. Massachusetts* for the same proposition.

Snyder and *Faretta* involved State court defendants, but in *United States v. Gagnon*, 470 U.S. 522, 526 (1985), this Court applied a Fifth Amendment due process right of presence to a Federal defendant. *Gagnon* involved an *in camera* hearing, held to address a juror's concern about the defendant's in-court behavior, that did not include the defendant. Although this Court found that the defendant had a right to be present, he was deemed to have waived it because the record showed that he was present at trial, knew about the hearing, and made no request to attend and no objection. *Id.* at 528.

The right of presence preserved in Rule 43 also finds support in what this Court has termed "the rule of orderly conduct of [a] jury trial." In *Shields v. United States*, 273 U.S. 583, 588-89 (1927), a trial court received a communication from the jury and responded to it, all out of the presence of the defendant. *Id.* at 584. *Shields* said that this rule of orderly conduct entitled the defendant "to be present from the time the jury is impaneled until its discharge after rendering the verdict." *Id.* at 589.

Because of the many and varied sources giving rise to the Rule, it is often spoken of as being broader than the

Constitutional right of presence. *United States v. Alessandrello*, 637 F.2d 131, 138 (3rd Cir. 1980), *cert. denied*, 451 U.S. 949 (1981); *United States v. Brown*, 571 F.2d 980, 986 n. 5 (6th Cir. 1978). There can be no doubt that Rule 43 does not permit the trial *in absentia* of a defendant not initially present, and was never intended to.[6]

C. Courts holding that a defendant not initially present for his trial may be tried in his absence misconstrue *Diaz v. United States* and Rule 43.

Despite Rule 43's clear prohibition against trying *in absentia* a defendant who is not initially present, a significant number of Federal Circuit Courts have affirmed

[6] It may seem surprising, given Rule 43's plain language, that no case involving trial of a defendant not initially present has resulted in a reversal. The Rule 43 case closest on its facts to Petitioner's case is *United States v. Hudson*, 313 F.Supp. 422 (D.C. Del. 1970), which involved a proceeding to set aside a forfeiture of a bail bond occasioned by a defendant's failure to appear for trial. The district court responded to the bondsman's contention that the court could have tried the defendant *in absentia* by pointing out that Rule 43 would have prohibited that. 313 F.Supp. at 426. Although we have not found a case that directly involves, and which reverses, a trial court's decision to try *in absentia* a defendant not initially present, many cases have discussed or mentioned approvingly the language in Rule 43(b)(1) limiting trial *in absentia* to only such defendants, even though the cases themselves involve defendants who left after their trials had begun. See, *Pearson v. United States*, 325 F.2d 625, 627 (D.C. Cir. 1963); *Cross v. United States*, 325 F.2d 629, 631 (D.C. Cir. 1963); *Cureton v. United States*, 396 F.2d 671, 675 (D.C. Cir. 1968); *United States v. Miller*, 463 F.2d 600, 603 (1st Cir.), *cert. denied*, 409 U.S. 956 (1972); *Government of the Virgin Islands v. George*, 680 F.2d 13, 15 (3rd Cir. 1982); *Parker v. United States*, 184 F.2d 488, 489 (4th Cir. 1950); *United States v. Hernandez*, 842 F.2d 82, 84 (5th Cir. 1988); *United States v. Garcia-Turino*, 458 F.2d 1345, 1346 (9th Cir. 1972). Cases have, of course, held that it is permissible to try a defendant who is not initially present, see footnote 7, *infra*, but the absence of contrary cases does not mean that courts have never applied Rule 43 to preclude trial *in absentia* on facts such as Petitioner's. If a court follows the Rule when the defendant does not appear, the trial does not take place and no appealable issue arises.

convictions obtained in trials where the defendant did not initially appear, or was absent for the entire trial.[7] Two of the earliest and most-cited of these cases are *United States v. Peterson*, 524 F.2d 167, 184 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976), in which the Fourth Circuit disregarded the "initially present" language of Rule 43 to find a waiver of the right of presence, and *Government of the Virgin Islands v. Brown*, 507 F.2d 186, 189 (3rd Cir. 1975), where the Third Circuit held that a defendant who knew when his trial was to begin, but who missed jury-selection, had waived his Constitutional and Rule 43 rights of presence. These cases are significant not only because many of the cases permitting trial *in absentia* of defendants not initially present cite them,[8] but because the Eighth Circuit Court of Appeals expressly adopted their reasoning to find that the Petitioner had waived his right to be present (J.A. 57-59).

We first examine the decision in *United States v. Peterson*. *Peterson* recognized that the requirement in Rule 43 that the defendant be "initially present" came from *Diaz v. United States*, but it got around the Rule by distorting *Diaz*'s statement that the Sixth Amendment and the common law permit trial *in absentia* only of a defendant initially present. *Peterson* said:

> In speaking of a defendant's voluntary absence 'after the trial has begun,' the *Diaz* court was referring

[7] The defendants in the following cases were not present for any portion of their trial, and the various Circuit Courts upheld the trial courts' decisions to proceed *in absentia*: *United States v. Sanchez*, 790 F.2d 245, 249 (2nd Cir.), *cert. denied*, 479 U.S. 989 (1986); *Government of the Virgin Islands v. Brown*, 507 F.2d 186, 189 (3rd Cir. 1975) (defendant appeared in the afternoon of the first day of trial); *United States v. Peterson*, 524 F.2d 167, 184 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *United States v. Powell*, 611 F.2d 41, 42 (4th Cir. 1979); *United States v. Muzevsky*, 760 F.2d 83, 84 (4th Cir. 1985); *United States v. Shockett*, 753 F.2d 336, 340 (4th Cir. 1985); *United States v. Houtchens*, 926 F.2d 824, 826 (9th Cir. 1991); *United States v. Wright*, 932 F.2d 868, 879 (10th Cir. 1991).

[8] See the cases cited in footnote 7.

> merely to the factual context in which that particular defendant's voluntary waiver occurred—*i.e.*, after the commencement of his trial.

524 F.2d at 184.

Because the precise issue on appeal in *Diaz* was whether the defendant had the ability under the Philippine statutes to waive his presence, and if he did not, whether his absence deprived the trial court of the power to proceed, *Diaz* did not explicitly state that its decision to affirm the defendant's conviction rested on his leaving after the trial had begun instead of before. However, considering *Diaz*'s authoritative statement that the Sixth Amendment and the common law permit a trial *in absentia* only if the defendant leaves after his trial begins, 223 U.S. at 454-55, if the defendant had left before the trial his conviction certainly would have been reversed.

To lend additional support to its decision, *Peterson* further misconstrues *Diaz*. *Peterson* says that the Philippine *statutes* are the substantial equivalent of the Sixth Amendment right to be present at trial. 524 F.2d at 184. *Peterson* then asserts that because the statutes did not *require* the defendant's presence at the trial, then neither does the Sixth Amendment, so that by implication the right of presence of which *Diaz* spoke, and incorporated in Rule 43, does not prevent a defendant's voluntary absence at the start of trial from serving as a waiver of the right to be present. *Id.*

Peterson's reasoning is wrong because it misreads the *Diaz* opinion. What *Diaz* actually says is that it is the Philippine *constitutional provision*, Section 5 of the Civil Government Act, not the statutes, that substantially equates to the Sixth Amendment right of presence. 223 U.S. at 454-55.[9] In trying to define the Sixth Amend-

[9] The relevant portion of the *Diaz* opinion says:

> We are thus brought to the question whether the provision in [Section] 5 of the Philippine civil government act, securing to the accused in all criminal prosecutions 'the right to be heard by himself and counsel,' makes his presence indispensable at every stage of the trial, or invests him with a right which he is always free to assert, but which he may also waive by his voluntary act. Of course, if that provision makes his presence thus indispensable, it is of no moment that the Philippine laws do not go so far, for they cannot lessen its force or effect. An identical or similar provision is found in the Constitutions of the several states, and its substantial equivalent is embodied in the 6th Amendment to the Constitution of the United States. It is the right which these constitutional provisions secure to persons accused of crime in this country that was carried to the Philippines by the congressional enactment, and, therefore, according to a familiar rule, the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there (citation omitted).

223 U.S. at 454-55. There is no doubt that the "provision in [Section] 5" is the "identical . . . provision found in the Constitutions of the several states, and its substantial equivalent . . . embodied in the Sixth Amendment . . . ." *Id.*

ment by what the Philippine statutes said, *Peterson* turned *Diaz* on its head, since the whole point of *Diaz*'s analysis was to define the Civil Government Act by reference to the Sixth Amendment. The conclusion *Peterson* tries to draw concerning the scope of the right of presence discussed in *Diaz* finds no support in *Diaz*'s text.

Peterson has in effect superimposed on Rule 43 a provision for waiver of the right of presence broader than the one written into it, but the specious reasoning to which it resorts in the process (unfortunately followed by many courts), really just masks an effort to circumvent a Rule it knows was designed to prevent the trial *in absentia* of a defendant not initially present. This may be expedient, but it is not the law.

The Third Circuit's decision in *Government of the Virgin Islands v. Brown*, which the Eighth Circuit also relied on, is just as inaccurately reasoned as is *United States v. Peterson*. The Eighth Circuit, however, agreed with *Brown* (J.A. 58-59) that Rule 43's "initially pres-

ent" limitation merely paraphrased the holding in *Diaz*, and that no special significance should attach to it because, in the *Brown* court's words, there are no

> talismanic properties which differentiate the commencement of a trial from later stages. It would be anomalous to hold that a defendant cannot waive his right to be present during the period of often routine voir dire questioning but can waive that right during the time when witnesess against him are presenting crucial evidence.

507 F.2d at 189. *Brown* says that presence at the beginning of trial, as used in Rule 43, would have significance only if the defendant did not know when his trial was to begin. *Id.*

Brown's analysis misses the point, but for a different reason than did *Peterson*'s. The reason *Diaz* and the cases it cited used the defendant's presence at the beginning of trial to mark the point at which a waiver of presence may occur has less to do with formalistic distinctions than it does with the balancing process the common law developed to determine when a criminal defendant's interest in being present at his trial is outweighed by the justice system's interest in being able to function and complete its work. A careful review of *Diaz* and the early State and federal cases it cites is persuasive that the common law struck a balance between its strong desire to avoid trial *in absentia*, which has always been disfavored in this country, see *United States v. Alikpo*, 944 F.2d 206, 209 (5th Cir. 1991), and the practical consideration that a trial in progress ought to proceed to a conclusion even if the defendant absents himself.

As for a review of *Diaz*, the preceding discussion in Parts A and B of this brief leaves no doubt as to how it interpreted the Constitutional and common law right of presence.[10] Illustrative of how the lower federal courts

[10] See also, *Lewis v. United States*, 146 U.S. 370, 372 (1892), which, relying on the common law, said that "after indictment, nothing shall be done in the absence of the prisoner . . ." and that it "is not in the power of the prisoner . . . to waive the right to be personally present during the trial." *Lewis* reversed a defendant's conviction because challenges to the jurors had been made before he was present. *Diaz* actually represents a more restrictive view of the right of presence than does *Lewis* because *Diaz* interprets the Constitution and the common law to permit a waiver of that right if the defendant leaves after the trial begins.

early-on interpreted the right of presence is *Falk v. United States*, discussed at page 16 of this brief. Other significant Federal cases are cited in the Advisory Committee Note to Rule 43, quoted at page 13 of this brief. The many State cases cited in *Diaz*, 223 U.S. at 455-56, serve to confirm that *Diaz*, and hence Rule 43, prohibit the trial *in absentia* of a defendant not initially present. We cite here, and quote briefly, some of those cases: *Sahlinger v. People*, 162 Ill. 241, 246 (1882) (". . . where a prisoner after a trial has begun, wrongfully and voluntarily abandons the courtroom . . . he must be regarded as having waived a right which is guaranteed to him."); *State v. Perkins*, 40 La. Ann. 210, 212, 3 So. 647, 648 (1888) (". . . if the trial is once commenced and the prisoner, of his own wrong leaves the court, he abandons his case to the management of counsel . . . [and] the proceedings will not be stayed."); *Gore v. State*, 52 Ark. 285, 286, 12 S.W. 564, 565 (1889) ("if he escapes from custody after the trial has commenced, or if on bail shall absent himself during the trial, the trial may either be stopped or progress to a verdict . . . .").

For purposes of determining the meaning of Rule 43's "initially present" limitation, then, the commencement of trial, at common law and in *Diaz*, does not have a significance *per se*, much less a "talismanic" property. Nor does the function that presence at trial serves as proof that the defendant knows about the trial seem to be the main concern of the common law, as important as presence is in ensuring that if the defendant departs, he knows his trial is taking place. The common law instead views the beginning of trial as the point in the prosecu-

tion at which a defendant's later, voluntary absence permits other considerations facing the court, among them finality and judicial economy, to predominate and to allow the trial to proceed to a conclusion. It obviously came as no surprise to any court that gave effect to the common law rule concerning trial *in absentia* that one of its drawbacks was to permit a defendant to put off his day in court, and possibly to frustrate the ends of justice. However, as *Diaz* and the cases it cites plainly imply, 223 U.S. at 455-56, the rule represents the high value which the American justice system places on having a defendant present at his trial.

Because the reasoning underlying *Peterson* and *Brown*, the most important of the cases supporting the Eighth Circuit's interpretation of Rule 43, lacks support in logic and in the law, this Court should enforce Rule 43 as it is written and not permit the lower Federal courts to circumvent it by judicially engrafting onto the Rule a waiver provision that contradicts its letter and spirit.

D. Aside from Rule 43's plain language and its Constitutional and common law underpinnings, considerations of sound procedure and practice in the Federal judicial system require that this Court apply Rule 43 as written.

We began this brief with the argument that Rule 43's plain wording prohibited the trial court from proceeding with Petitioner's trial because he was not "initially present." We then demonstrated the Rule's solid grounding in the common law and the Constitution, as evidenced by this Court's decision in *Diaz v. United States*, and other cases. We now return to our opening premise, that the Rule's plain language must be given effect, but we argue it from a different perspective, namely, that considerations of procedure and practice in the Federal judicial system, to which this Court as the system's supervisory authority necessarily must be attentive, require the Rule to be applied as written. This argument will demonstrate that even if the Constitutional and common law concerns

that brought about Rule 43 are no longer deemed valid, or if the Petitioner could somehow be considered to have waived his Constitutional right of presence, Rule 43 standing by itself must be given effect.[11]

Common sense and the principles of statutory construction are two practice-oriented considerations applicable here. A common sense canon of construction is that a statute should not be interpreted to render one part inoperative. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). In construing a statute, a court is moreover obliged to give effect, if possible, to every word. *Reiter v. Sonotone Corporation*, 442 U.S. 330, 339 (1979). These cases thus mandate that courts give effect to the part of Rule 43 that requires a defendant to be "initially present."

Another relevant principle of construction is that when a law or rule-making body lists certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of a contrary intent. *Andrus v. Glover Construction Company*, 446 U.S. 608, 616-17 (1980). This principle embodies the Latin phrase "*expressio unius est exclusio alterius.*" See, *United States v. Jones*, 567 F.2d 965, 967 (10th Cir. 1977) (interpreting Federal Rule of Criminal Procedure 54). As applied to the Petitioner's case, this principle precludes what the Third and Fourth Circuits did in *Government of the Virgin Islands v. Brown* and *United States v. Peterson*, cited previously, which was to superimpose a waiver provision on Rule 43(b) to permit trial *in absentia* in the case of a defendant not initially present. Rule 43, though, already contains a waiver provision, which says that

> . . . the defendant shall be considered to have waived the right to be present whenever a defendant, initially

[11] See, *United States v. Songer*, 842 F.2d 240, 242 (10th Cir. 1988) (Defendant's *in absentia* sentencing constituted a violation of Rule 43 independently of any Constitutional error).

present (1) is voluntarily absent after the trial has commenced . . . .

Obviously, since the Drafters of Rule 43 contemplated the concept of waiver, and gave it expression in the form of the above-quoted portion of the Rule, the absence of a far-broader waiver provision, such as the one devised in *Peterson* and in *Brown*, must be presumed to have been intentional on the Drafters' part.

If this Court does permit to stand what some Federal district courts and Circuit Courts of Appeal have done in superimposing a waiver provision onto Rule 43 to permit trial *in absentia* of defendants not initially present, the results will include not only a denial of the right of presence guaranteed under the Rule and the Constitution (and on a far broader scale than has occurred to date), but a lack of uniformity in Federal procedure, and possibly the denial of due process. For example, because Rule 43 does not contemplate that a defendant not initially present can waive his right to be present, it establishes no procedure for determining if such a defendant *is* voluntarily absent. Therefore, trial courts have had, and will have to, devise procedures to decide whether a defendant who does not appear for trial has knowingly and voluntarily waived his right of presence.

The courts that have decided that it is permissible to try a defendant who does not initially appear, and which are cited in footnote seven at page 19 of this brief, did not hold evidentiary hearings to determine if the defendant voluntarily absented himself. They instead satisfied themselves with making an informal inquiry into the defendant's whereabouts. In fact, in one of the cases, *Government of the Virgin Islands v. Brown*, 507 F.2d at 187, the trial court waited only moments after the defendant was supposed to have appeared before proceeding, and in another, *United States v. Sanchez*, 790 F.2d 245, 250 (2nd Cir. 1986), the trial court, although it waited a day before proceeding, apparently relied solely on the defendant's attorney's statement that there was no evidence

of where the defendant was in deciding that the trial should proceed. In a case not cited in footnote seven, *United States v. Mera*, 921 F.2d 18 (2nd Cir. 1990), the trial court held an evidentiary hearing, but decided that it was not necessary that the absent defendant even have known of the trial date to justify proceeding! 921 F.2d at 20-21. *Mera* deemed it sufficient that the defendant had attended the arraignment and knew of the proceedings against him. *Id.* Some Circuit courts have reversed when a trial court failed to conduct an adequate inquiry into a defendant's absence. See, *United States v. Hernandez*, 873 F.2d 516, 519 (2nd Cir. 1989) and *United States v. Camacho*, 955 F.2d 950, 954 (4th Cir. 1992). These cases, however, only highlight the lack of uniformity in the Federal courts caused by the failure to follow Rule 43 as it is written.

Not only do the Federal courts lack any uniform, mandatory procedure for determining when a defendant has absented himself, once they make this finding, there is no uniform standard they can apply to decide whether the trial should in fact proceed. A test originating in one of the early cases involving a defendant who absented himself, *United States v. Tortora*, 464 F.2d 1202 (2nd Cir. 1972), *cert. denied*, *Savtoro v. United States*, 409 U.S. 1063 (1972), has achieved currency among courts that permit a defendant who has not appeared to be tried *in absentia*. (In the Petitioner's case, the trial court and the Eighth Circuit cited *Tortora*. (J.A. 37, 59-60). *Tortora* says that before proceeding with a trial *in absentia*, a court should weigh a complex of issues, including the likelihood that the trial can soon take place with the defendant present, the difficulties attendant to rescheduling the trial, especially multi-defendant trials, and the burden on the Government and the witnesses in having two trials. *Id.* at 1210.

Courts that apply the *Tortora* test have, however, diverged on how much discretion it gives the trial judge.

According to *United States v. Sanchez*, cited above, the test confers "broad discretion." 790 F.2d at 250. In *United States v. Hernandez*, 842 F.2d 82, 85 (5th Cir. 1988), though, the Fifth Circuit applied the identical factors discussed in *Tortora*, but held that in applying them a trial court has only "narrow discretion" to proceed with the trial when the defendant is not initially present.

The lack of uniform, mandatory procedures and standards for determining when a defendant has absented himself is understandable, especially considering that the Federal trial and appellate courts are operating outside Rule 43 when they permit the trial of a defendant not initially present, but this does not make it acceptable. Letting the lower Federal courts fashion procedures and standards on an *ad hoc* basis will only lead to divergent practices and a lack of uniformity in the Federal system. Moreover, in certain cases it will result in the denial of procedural due process to defendants, as occurred in the *Mera* case, where the court did not even find it necessary to establish the defendant's knowledge of the trial date before ordering his trial to proceed.

Another practice-related issue presented by the Petitioner's case is that if this Court affirms the increasingly common practice of ignoring Rule 43's limitation on *in absentia* trials, it will be encouraging courts to make departures from, or to engraft exceptions onto, other Rules. The Federal courts' treatment of Rule 43 should be especially disturbing, not only because those courts are not following a rule promulgated by this Court, but because nothing this Court has written would have suggested to them that ignoring Rule 43's limitation on *in absentia* trials would be permissible. A brief review of this Court's Rule 43 cases establishes this.

In *Illinois v. Allen*, cited earlier, this Court addressed the problem of the defendant who is present at trial but whose conduct is disruptive, holding that such a defendant waives his rights of presence under the Constitution

and Rule 43. 397 U.S. at 343. This Court again encountered Rule 43 in *Taylor v. United States*, 414 U.S. 17 (1973), which involved a defendant who absented himself after the trial had begun. *Taylor* said that the case presented no claim that Rule 43 had prohibited the *in absentia* trial because the Rule expressly provides for the continuation of a trial begun in the defendant's presence. 414 U.S. at 18. *Taylor* quoted approvingly, however, the portion of the opinion in *Diaz v. United States* stating that if the accused absents himself after the trial has begun in his presence, the trial may proceed, and said that Rule 43 reflected this long-standing rule. *Id.* at 19. *Rogers v. United States*, 422 U.S. 37 (1975) said that a court violated Rule 43 when it received and answered a note from a deliberating jury without notifying the defendant or his attorney. This Court remanded for a new trial. 422 U.S. at 39. In *United States v. Gagnon*, 470 U.S. 522, 528 (1985), discussed earlier, this Court found that questioning a juror outside a defendant's presence violated Rule 43, but that the defendant's knowing failure to object waived the issue.

Because none of these cases gives even a hint that Rule 43's limitation on trial *in absentia* to defendants initially present should not be enforced, this Court should be concerned about how faithfully the lower Federal courts will follow other rules. If trial and appellate courts now presume to ignore a plainly-worded rule, and do it without any indication from this Court that it would condone the practice, it is likely that those courts will in the future expect a certain freedom to apply or ignore rules, as they wish.

The preceding paragraphs have discussed the procedural and practical reasons why Rule 43 should not be violated. When a prejudicial violation of a Federal Rule of Criminal Procedure occurs, this Court may exercise its supervisory authority over the lower Federal courts to remedy it. See, *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1987). It should do so here. This

will prevent the problems that have arisen, and which may in the future arise, as a result of some courts' disregard of Rule 43.

E. Petitioner's absence from the trial was not harmless error.

We have established that the district court erred in trying the Petitioner *in absentia*, but a question remains as to prejudice. Normally, an appellant must show that the error complained of affected a substantial right. See Federal Rule of Criminal Procedure 52(a). This Court has said that the prejudice resulting from a Rule 43 violation can in some circumstances be a harmless error, *Rogers v. United States*, 422 U.S. 34, 40 (1975), as have the lower Federal courts, *United States v. Crutcher*, 405 F.2d 239, 244 (2nd Cir. 1968), *cert. denied*, 394 U.S. 908 (1969) and *Blackwell v. Brewer*, 562 F.2d 596, 600 (8th Cir. 1977). This implies that in most instances of a Rule 43 violation, the error cannot be harmless.

The right of presence, whether founded in the Constitution, common law, or Rule, is so fundamental that a defendant's absence from an *entire* trial should never be treated as harmless error. See, *Chapman v. United States*, 386 U.S. 18, 23 (1967) ("Our prior cases have indicated that there are some Constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"), and *Rushen v. Spain*, 464 U.S. 114, 17 n. 2 (1983) (Deprivation of the right of presence is subject to a harmless error analysis unless by its very nature the deprivation could not have been harmless). Conducting just the jury selection in the defendant's absence has been deemed so serious a breach of the right of presence as to make application of the harmless error test unnecessary. *United States v. Crutcher*, 405 F.2d at 244. In the Petitioner's case, because the Rule 43 violation resulted in his absence from the entire trial, no showing of prejudice should be required.

In any event, the facts of the Petitioner's case disclose that conducting the trial in his absence was not harmless error beyond a reasonable doubt. To begin with, the Government described the Petitioner to the jury as the most culpable defendant. In the Government's opening statement, the prosecutor said that the Petitioner was the "kingpin of the fraud scheme . . . ." (Tr. Vol. IV, 194). A large portion of the Government's proof consisted of witnesses testifying that they had bought medallions or investment certificates directly from the Petitioner (Tr. Vol. V, 501; Vol. VI 612; Vol. VII 886-87, 910; Vol. VIII 1004, 1045). One of the Government's key witnesses, an attorney from the Minnesota Department of Commerce, testified that he asked the Petitioner for documentation substantiating his fund-raising efforts b[illegible] that he never furnished it (Tr. Vol. X, 1515). A Postal Inspector testified that the Petitioner received the lion's share of the corporate funds (Tr. Vol. XII 1765-69). The Government also offered evidence that the Petitioner personally transacted many of the fund-raising effort's business operations (Tr. Vol. IX, 1339, 1349).

One of the Petitioner's co-defendants seized upon his absence to shift responsibility to him. Just after the court read into the record its findings and conclusions concerning trial *in absentia* (J.A. 41-45), it said that it did not want anyone to refer to the Petitioner's absence. (*Id.* at 45). Co-defendant Cheatham's counsel took exception to this ruling (*Id.*), and once the trial began, the trial court did permit the attorneys for the co-defendants to bring up the absence (Tr. Vol. V, 437). Cheatham's counsel, for example, asked the Petitioner's brother Philip, a former co-defendant who had made a deal to testify, if he knew where his brother was and if his brother knew he was supposed to be at the trial (Tr. Vol. V, 440-43). The Petitioner's counsel objected but was overruled (*Id.* at 438). The brother responded that the Petitioner had known about the trial but that he, Philip, did not know where the Petitioner was (*Id.* at 442-43). In his closing

argument, Cheatham's counsel told the jury that the Petitioner had "skipped," which was a "cowardly move," that he was "full of sin," and that the jury "should convict him of everything" (Tr. Vol. XVIII. 2413-14).

The Petitioner's absence prejudiced him in significant other ways. Because the court tried him *in absentia*, he could not assist in the selection of jurors or the cross-examination of witnesses. The inability to confront and cross-examine goes to the heart of the Sixth Amendment right to presence, and as noted above, absence from just the jury-selection process has been found to be grounds for a new trial. *United States v. Crutcher*, 405 F.2d at 244.

Conducting Petitioner's trial *in absentia* also meant he could not testify. It is somewhat speculative to assert now that he would have, but he did say at a motions hearing held less than a week before the trial: "I welcome the opportunity to defend myself against all of these charges . . . ." (Tr. Oct. 7, 1988 hrg., 20). Whether or not the Petitioner would have testified, it seems fair to say that just his presence at trial would have put the defense in a better position to dispute the evidence relating to finances and expenditures. The accounting of corporate funds had been a demonstrable concern of the Petitioner's, as he indicated at the October 7 hearing, referred to above (*Id.* at 19-20).

The district court's decision to try the Petitioner *in absentia* violated Rule 43 and resulted in his absence from the entire trial. Under these circumstances, no prejudice need be shown, but if it does, the Petitioner's alleged central role in the fraud scheme, the efforts of a co-defendant to use Petitioner's absence as proof of his guilt, and Petitioner's inability to testify, or at least be present to help dispute the evidence offered against him, prove that the prejudice accruing from his absence was not harmless beyond a reasonable doubt.

F. If Rule 43's limitation on *in absentia* trials is no longer desirable, the Rule can be changed, but until then it must be followed.

It cannot reasonably be contended that when the Drafters of the Rules of Criminal Procedure created Rule 43, and that when this Court adopted it, no one imagined that a defendant might not appear for his trial and that the resulting application of the Rule would prevent the trial from taking place until he returned or was located. Nor can it be contended, given the Rule's origins, that such a result is an absurd or unintended one. What can be reasonably contended, although we do not agree with it, is that applying Rule 43 as written, and as it was intended to apply, may create difficulties for the Federal judicial system which, given today's higher volume of cases and their increased cost and complexity, it may not wish to tolerate. The solution to whatever problems enforcement of Rule 43 has or will create is to change the Rule, not to deny its origins and meaning. A procedure for changing the Rules of Criminal Procedure exists under 28 U.S.C. Sections 2072, 2073, and 2074. These statutes put this Court in a position to initiate and oversee changes it considers appropriate.

Amending Rule 43 to permit trial *in absentia* of a defendant not intially present would undoubtedly be challenged on Constitutional grounds, given the Constitutional dimension that this Court in *Diaz* and subsequent cases has said the right of presence possesses. This Court could use the Petitioner's case to overrule *Diaz*, but it would still be faced with the Rule's plain wording prohibiting trial *in absentia* of a defendant not initially present. As a matter of raw judicial power, this Court could simply refuse to give effect to the Rule's "initially present" language, but this obviously is to be avoided, as it would lack the support of sound legal reasoning and would invite lower courts to disregard or deliberately misconstrue inconvenient rules or statutes in the hope that this Court will either affirm them, or because of the

volume of such decisions, simply lack the capacity to review them. The fair and prudent course, then, is to enforce Rule 43 as written.

CONCLUSION

The judgment of the Court of Appeals for the Eighth Circuit should be reversed, and the Petitioner should receive a new trial.

Respectfully submitted,

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